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No. 87-1836

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,
v.
BONNEVILLE POWER ADMINISTRATION,
JAMES J. JURA, as Administrator,
JOHN S. HERRINGTON, as Secretary of the
DEPARTMENT OF ENERGY OF THE UNITED STATES OF AMERICA,
and the UNITED STATES OF AMERICA,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

In its Brief in Opposition, the Bonneville Power Administration ("BPA") asserts that adoption of the Near Term Intertie Access Policy ("NTIAP") was consistent with its absolute authority to determine under what conditions utilities in the Pacific Northwest and Canada will be provided access to the Pacific Intertie for the sale of electrical power to California. Such a point of view is squarely at odds with applicable statutes requiring the BPA (1) to submit any change in any schedule previously established for the sale or transmission of electrical power to the Federal Energy Regulatory Commission ("FERC") for confirmation and approval, (2) to provide access to the Pacific Intertie in a fair and nondiscriminatory manner, and (3) to maintain competition to the maximum extent possible. In light of the BPA's refusal to comply with these requirements, and the enormous economic and environmental consequences resulting from such refusal, immediate review by this Court is imperative.

ARGUMENT

The BPA argues, by reference to the opinion below, that the NTIAP was not ratemaking, and thus not subject to review by the FERC, because it "did not impose any charges for power, define any formula for computing charges, or authorize BPA to alter its own charges for power." Opp. at 12 (citing App. at A10-13). The BPA frames the issue too narrowly. As stated by the Ninth Circuit in an earlier case, "A change in the availability provisions of the rate schedules [also] constitutes ratemaking." *Portland General Electric Company v. Johnson*, 754 F.2d 1475, 1481 (9th Cir. 1985).* Moreover, unlike other measures which may have an impact on the BPA's revenues, the NTIAP was specifically intended to increase the price to be charged California. App. at A13, n.2. Thus, by changing the conditions under which access is provided to the Pacific Intertie, the NTIAP affected not only the amount of energy California could purchase from the Pacific Northwest and Canada, but also the price it would be charged. App. A26, n.2. Accordingly, in light of these consequences, the BPA was required by Section 7(k) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839e(k), to submit the NTIAP to the FERC for confirmation and approval. *See* Pet. at 11.

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* The BPA cannot escape this point by arguing, on the basis of *Wisniewski v. United States*, 353 U.S. 901, 902 (1957), that any conflict between the opinion below and *Portland General, supra*, would be for the Ninth Circuit, and not this Court, to decide. *See* Opp. at 11, n.8. In *Wisniewski*, one panel of a Court of Appeals certified to this Court a question previously decided by another panel of that same court. 353 U.S. at 901. In dismissing the certificate, this Court held, "It is *primarily* the task of a Court of Appeals to reconcile its internal difficulties." *Id.* at 902 (emphasis added). But when a Court of Appeals does not reconcile the cases before it, review by this Court may be entirely necessary. That is precisely the situation here. Thus, in the proceeding below, the Ninth Circuit overlooked that the NTIAP effectively changed the "availability provisions" of the BPA's schedules for the transmission of nonfederal power by imposing new restrictions on access to the Pacific Intertie during times not covered by the Exportable Energy Agreement and by assigning to utilities in the Pacific Northwest a higher priority of service than to extraregional utilities. *See* App. at A12.

The BPA claims unlimited discretion in determining under what conditions it will provide access to the Pacific Intertie. For example, by its reading of the legislative history of Section 6 of the Pacific Northwest Consumer Power Preference Act, 16 U.S.C. § 837e, Congress could not have intended that utilities in Canada be afforded the same access as those in the Pacific Northwest since "BPA would have no incentive to provide *any* service to Canada if, when it did provide service, it had to be on the same terms as that provided to Northwest utilities." Opp. at 15, n.10 (citing H. R. Rep. 590, 88th Cong., 1st Sess. 9 (1963)) (emphasis in original). But why the BPA would be justified in favoring utilities in the Pacific Northwest over those in Canada is not explained. In any case, whatever may be the BPA's justification, the legislative history cited by the BPA quite clearly indicates that, although standing in line behind federal energy and "Canada's entitlement to downstream power benefits," energy generated in Canada "stands on the same basis as any other non-Federal energy." H. R. Rep. No. 590, *supra*, at 9. Moreover, as the statute itself provides,

> *Any capacity in Federal transmission lines connecting*, either by themselves or with non-Federal lines, *a generating plant in the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest,* which is not required for the transmission of Federal energy or the energy described in Section 837h of this title, *shall be made available as a carrier for transmission of other electric energy between such areas.*

16 U.S.C. § 837e (emphasis added).

Any doubt that Congress intended such capacity to be provided fairly and without discrimination to utilities in both the Pacific Northwest and Canada is removed by the plain language of Section 6 of the Federal Columbia River Transmission System Act:

> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

16 U.S.C. § 838d. Nonetheless, the BPA argues that "[t]he legislative history shows that the sole purpose of Section 838d was to make clear BPA's obligation to treat publicly owned utilities and investor-owned utilities alike in granting access to its transmission system." Opp. at 17 (citing H.R. Rep. 93-1375, 93d Cong., 2d Sess. 5 (1974)). The language of the House Report cited by the BPA is not, however, reasonably susceptible to the inference that equal treatment shall be accorded *solely* to utilities in the Pacific Northwest and not to those in Canada as well. Indeed, the accompanying Senate Report explains that, without exception, all classes of the BPA's customers shall be treated equally. Sen. Rep. No. 93-1030, 93d Cong., 2d Sess. 10 (1974). Similarly unavailing to the BPA is its reference to the statement in the House Report " 'that Section 6 is not intended to represent a policy having application other than in the Pacific Northwest . . . . ' " Opp. at 18 (quoting H.R. 93-1375, *supra*, at 5). As the previously-mentioned Senate Report further explains, the obligation to provide nondiscriminatory service applies only to the BPA and not to federal agencies operating elsewhere in the United States: "It is not the Committee's intention to make an expression of Congressional policy regarding the transmission of energy over Federal systems outside the Pacific Northwest." Sen. Rep. No. 93-1030, *supra*, at 10. In sum, once its legitimate needs have been met, the BPA is required to transmit energy for any utility in the Pacific Northwest or Canada that can arrange a transaction with California.

The BPA argues that, in adopting the NTIAP, it was not required to maintain competition to the maximum extent possible, but merely to strike "a reasonable balance between antitrust concerns and BPA's statutory obligation to be fiscally self-supporting." Opp. at 20-21 (citation omitted). Quite the contrary, the statutes governing the BPA "indicate[ ] an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *See Otter Tail Power Company v. United States*, 410 U.S. 366, 374 (1973). Thus, under Section 2(b) of the Bonneville Project Act, the BPA is directed "to encourage the widest possible diversified use of all electric energy that can be generated and marketed" and "to prevent the monopolization thereof by limited groups." 16 U.S.C. § 832a(b).

Similarly, Section 5 of the Flood Control Act of 1944 provides that the BPA "shall transmit and dispose of such . . . energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles . . . ." 16 U.S.C. § 825s. If these requirements are to have any meaning, the BPA is certainly obliged to do more than merely claim that it considered the anticompetitive aspects of the NTIAP and balanced them against its other responsibilities. Indeed, at no time has the BPA demonstrated why its fiscal needs cannot be met without resort to monopolistic control over the Pacific Intertie. *See* Pet. at 15. Nor has it adequately explained why the exercise of such control is necessary to protect utilities in the Pacific Northwest from competition. *See* App. at A26. Under these circumstances, by failing to scrutinize closely the BPA's development of the NTIAP, the Ninth Circuit wrongly excused the BPA from maintaining competition to the maximum extent possible. *See Gulf States Power Company v. Federal Power Commission*, 411 U.S. 747, 763 (1973).

Finally, the BPA argues that any challenge before this Court to the NTIAP "is, in most respects, now moot" as a result of its adoption of the Long Term Intertie Access Policy ("LTIAP") on May 17, 1988. Opp. at 10. To the contrary, however, rather than making any such challenge moot, the BPA's adoption of the LTIAP serves to underscore the importance of immediate review by this Court. In the first place, the LTIAP represents little if any change in the way the BPA provided access to the Pacific Intertie under the NTIAP. Thus, not only will access under Condition 1 still be allocated on the basis of fixed, proportional shares, but Canadian utilities will continue to be excluded except during Condition 3 when they pose no competitive threat. In addition, the experiment proposed to be conducted during Conditions 2 and 3 will likely have little effect on competition in the Pacific Northwest since the BPA plans to reserve for itself as much as two-thirds of the Pacific Intertie's capacity at such times. Moreover, if its argument is now accepted, nothing would apparently stop the BPA from later issuing a new policy and then arguing that challenges to the LTIAP have become moot. In the meantime, of course, the BPA could continue to exert monopolistic control over the interregional market, with consumers

throughout California having to pay several hundred million dollars more each year than they would under a system of open access to the BPA's share of the Pacific Intertie. Such a result would be in direct contravention of the arrangement intended by Congress and must be forestalled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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